STATE OF MICHIGAN

COURT OF APPEALS

DAVID M. CLAPPER and OAK LEAF FINANCIAL CORP.,

Plaintiffs/Counter-Defendants-Appellants,

v

CHESTER J. ZOCHOWSKI, CHET'S PROPERTIES #1, INC., WASHBURN INVESTMENTS, KORRIN KRIEG, and KUS RYAN & ASSOCIATES, PLLC,

Defendants,

ROMEO EXPEDITORS, INC., KORTEN QUALITY SYSTEMS, LTD., and REI LOGISTICS, LLC,

Defendants/Counter-Plaintiffs,

and

BANK OF AMERICA,

Defendant-Appellee.

UNPUBLISHED
August 5, 2014

No. 313133
Oakland Circuit Court
LC No. 2011-120587-CK

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right a stipulated order of dismissal with prejudice following entry of an order that denied plaintiffs' motion for summary disposition and granted summary disposition in favor of defendant Bank of America's ("BOA"). Because there was no genuine issue of material fact that BOA breached ¶ 3(d) of the restated agreement, we reverse and remand for entry of summary disposition in favor of plaintiff Oak Leaf Financial Corp. ("Oak Leaf") on this issue.

I. BASIC FACTS

This case arises from an agreement[1] entered into between Oak Leaf and BOA. In the agreement, Oak Leaf agreed to purchase $1.7 million in debt owed to BOA by certain corporate defendants. These corporate defendants were, in turn, owned by defendant Chester Zochowski. Pursuant to the agreement, Oak Leaf provided BOA with a $100,000 earnest money deposit. As part of its duties under the agreement, BOA was required to provide certain documents before closing, to use its "best efforts" in delivering other enumerated items before closing, and to refrain from entering into negotiations or selling the loan obligations before any closing occurred. But at the scheduled closing on February 18, 2011, Zochowski did not appear, which resulted in the closing not being consummated.

Immediately after the failed closing, plaintiff David Clapper's attorney contacted BOA and notified it that Clapper, individually, would be willing to enter into a new agreement to purchase the loan obligations that would not require Zochowski's involvement. Thereafter, BOA entered into negotiations with a third party, C.P. Ventures ("CPV"), and ended up selling the loan obligations to it.

Plaintiffs filed a complaint, and in count IV of the complaint, they alleged breach of contract against BOA. Specifically, plaintiffs alleged, in part, that BOA breached the agreement when it failed to use its best efforts in producing various defendants at the closing, failed to provide the necessary documents for closing, entered into negotiations with various defendants regarding the loan obligations, wrongfully attempted to unilaterally terminate the agreement, and sold the loan obligations to a third party when it was prohibited from doing so.

At the trial court, plaintiffs moved for partial summary disposition pursuant to MCR 2.116(C)(10) on their breach of contract claim against BOA. Plaintiffs raised the sole issue of whether BOA breached the agreement when it entered into negotiations with a third party and sold the subject loan obligations to that party, allegedly in violation of ¶ 3(d) of the agreement, which prohibited BOA from "enter[ing] into any negotiations or entertain any other offers with respect to the Borrower Loan Obligations." Plaintiffs argued that, regardless of the scheduled closing never coming to fruition, ¶ 3(d)'s prohibition was still in effect because the agreement was never terminated by any party in accordance with the agreement's terms.

With respect to the issue raised in plaintiffs' motion for summary disposition, BOA argued at the trial court that the agreement was abandoned by the time it had entered into the negotiations with CPV to sell the loan obligations. BOA relied on the communications authored by Clapper's counsel, which occurred after the failed February 18, 2011, closing and provided, in relevant part, that Clapper "is willing to do a new deal" with BOA but without Zochowski.

BOA also argued that even if the agreement was not abandoned, its *other* obligations were excused under the doctrines of impossibility and impracticability. Specifically, BOA

[1] The negotiations culminated with the execution of a documented entitled "Restated Purchase and Assignment Agreement." Our use of the term "agreement" refers to this document.

claimed that its performance[2] was rendered impossible to fulfill once Clapper and Zochowski could not reach their own deal, which resulted in Zochowski not participating at the scheduled February 18, 2011, closing. BOA also argued that, contrary to plaintiffs' assertions in their complaint,[3] it did not breach the agreement by failing to produce Zochowski and the corporate defendants at the closing. BOA explained that it was under no obligation to actually produce them. Curiously, BOA also mischaracterized the issue raised by plaintiffs by stating that "in [plaintiffs'] motion[,] the only cause that Plaintiffs claim [BOA] failed to perform is ¶ 11(p)." But as noted earlier, this is incorrect—the sole issue that plaintiffs raised in their motion for partial summary disposition was that BOA breached ¶ 3(d) of the agreement, when it sold the loan obligations, while the agreement was still in effect.

In a reply brief, plaintiffs argued, in part, that BOA waived the defenses of abandonment and impossibility because, being affirmative defenses, BOA was required to plead them, and it never did. Plaintiffs also noted that BOA never moved to amend to add them.

The trial court addressed the issues as BOA framed them and stated that the "restated agreement placed no burden on [BOA] to produce [Zochowski] and the [corporate] defendants . . . in order to close the deal," and that plaintiffs "offer[ed] no authority for the Court to find [that BOA] could have forced Mr. Zochowski to closing and that its failure to do so results in liability." With regard to plaintiffs' allegation that BOA breached ¶ 3(d) of the agreement, the trial court stated, without any elaboration, that "[w]hen closing did not occur on the restated agreement, it was, in effect, abandoned" and that BOA thereafter "was not precluded from negotiating with third parties." The court, consequently, denied plaintiffs' motion for summary disposition and instead granted summary disposition in favor of BOA under MCR 2.116(I)(2).

Plaintiffs moved for reconsideration under MCR 2.119(F) and argued that

> after initially correctly articulating the issue [before it], the Court proceeded to erroneously transform the issue into something immaterial to resolution of the issue actually presented. Instead of addressing whether [BOA] appropriately terminated the Agreement following Mr. Zochowki's failure to appear before entering into the substitute arrangement with another party, the Court's ruling transformed the issue into whether [BOA] was the cause of the failure of the

[2] Notably, BOA never argued that it was impossible for it to not breach ¶ 3(d) of the agreement. Instead, BOA expanded the scope of plaintiffs' motion for summary disposition to include some of its other obligations under the agreement, including the following: delivering the items described in ¶¶ 11(a), (b), (d)-(h), and (o) before the closing date; and exercising "its best efforts" to deliver the items described in ¶¶ 11(i), (k), (*l*), (p), and 12 before the closing date.

[3] BOA, in its response to plaintiffs' motion for partial summary disposition, admitted that while the allegation was contained in plaintiffs' complaint, it was not a basis for plaintiffs seeking summary disposition.

> transaction to close, and whether [BOA] breached by failing to produce Mr. Zochowski at the February 18, 2011 scheduled closing.

Plaintiffs also reiterated that the defenses of abandonment and impossibility were affirmative defenses that BOA was required to plead, which meant that those defenses were waived.

The trial court subsequently denied the motion for reconsideration.

II. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012). "Summary disposition is properly granted under MCR 2.116(I)(2) to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003) (internal punctuation omitted). "Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo." *McCoig Materials*, 295 Mich App at 694.

III. ANALYSIS

A.

Because the trial court ruled on matters not properly before it, the trial court erred. See *Al-Maliki v LaGrant*, 286 Mich App 483, 488-489; 781 NW2d 853 (2009) (stating that due process can be implicated when issues not properly before the court are decided). The sole issue before the trial court, as raised in plaintiffs' motion for partial summary disposition, was whether there was a genuine question of fact that BOA breached ¶ 3(d) of the agreement when it entered into negotiations and sold the loan obligations to a third party. It was inappropriate for the trial court to award summary disposition in favor of BOA on other issues (e.g., whether BOA breached other paragraphs of the agreement) when they were not the subject of the motion. We note that while a court may sua sponte grant summary disposition in favor of a party pursuant to MCR 2.116(I)(1), the trial court did not cite or rely on that court rule. Instead, the trial court relied on MCR 2.116(I)(2), which merely provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." The clear implication of this rule is that judgment can only be ordered in favor of the opposing party *with respect to the issues raised by the moving party*.

As such, we reverse the trial court's order, to the extent that it covered other issues, and our review will be limited to the sole issue raised in plaintiffs' motion for summary disposition.

B.

Plaintiffs sought summary disposition on the limited basis of BOA breaching ¶ 3(d) of the agreement when it sold the loan obligations to a third party before the agreement was properly terminated. In its response at the trial court, the only argument BOA offered in defense of this claim was that the agreement was abandoned by the time it entered into negotiations to sell the loan obligations to a third party.

Paragraph 3 of the restated agreement provides, in part:

> From and after the Execution Date until Closing or until [plaintiff Oak Leaf's] obligations hereunder are terminated in accordance with paragraph 22, [BOA] agrees that it shall not:
>
> * * *
>
> c. take any action to modify any of the Borrower Loan Obligations; or
>
> d. enter into any negotiations or entertain any other offers with respect to the Borrower Loan Obligations.

The parties do not dispute that BOA sold the debt that was originally the subject of the restated agreement to CPV, which signed a letter of intent on March 2, 2011, and closed with BOA on June 14, 2011.

Plaintiffs argue that, because (1) no closing had yet to occur and (2) the agreement, as well as Oak Leaf's obligations under the agreement, never was formally terminated in accordance with the procedures described in the agreement, the agreement remained in effect, which meant that BOA's subsequent sale of the loan obligations to the third party necessarily constituted a breach of ¶ 3(d). We agree. Paragraph 3 provided that the proscription against negotiating with third parties applied "[f]rom and after the Execution Date until Closing or until [plaintiff Oak Leaf's] obligations hereunder are terminated in accordance with paragraph 22." Thus, the prohibition against BOA from selling the loan obligations to a third party remained in force, as long as the agreement was still in effect, if (1) no closing had occurred and (2) Oak Leaf's obligations were not terminated under the agreement. There is no dispute that the closing, while scheduled for February 18, 2011, never occurred. Additionally, there was no evidence that the agreement itself was terminated or Oak Leaf's obligations were terminated under the agreement.[4] Therefore, BOA breached ¶ 3(d) of the agreement when it sold the loan obligations to CPV.

[4] One way that the agreement could have been terminated is contained in ¶ 8 of the agreement, which provides, in part, "If [BOA] is unable to deliver the item described in ¶ 11(p) despite its best efforts, [BOA] may terminate this Agreement by written notice delivered to [Oak Leaf] and [BOA's] counsel shall return the Deposit to [Oak Leaf], at which time[,] neither party shall have

BOA argues on appeal, as it did at the trial court, that, while the agreement was not "terminated," it nonetheless was not in effect when it sold the loan obligations to CPV because the agreement had been abandoned. However, as plaintiffs properly note, under MCR 2.111(F), "a defendant waives any affirmative defenses not set forth in the defendant's *first responsive pleading*." *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 212; 840 NW2d 730 (2013), citing *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 164; 677 NW2d 874 (2003) (emphasis added). This Court has indicated that the abandonment of a contract is an affirmative defense, *Doornbos v Nordman*, 26 Mich App 278, 280; 182 NW2d 362 (1970), and we are in agreement.

> An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. In other words, it is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings. [*Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993).]

Here, BOA is not denying the allegation contained in plaintiff's complaint, that it sold the loan obligations to CPV without terminating the agreement; instead, it is claiming that the contract itself was not in effect, due to its abandonment, which falls under the definition adopted by this Court. It is undisputed that BOA did not raise the affirmative defense of abandonment in its first responsive pleading, which was its answer. Accordingly, BOA has waived the defense and cannot utilize it.

Therefore, the trial court erred in relying on the defense when it granted summary disposition in favor of BOA. Instead, there was no question of fact that that BOA breached ¶ 3(d) of the agreement, and Oak Leaf was entitled to summary disposition on its breach of contract claim with respect to this aspect.

C.

We are cognizant that under MCR 2.116(I)(5), when grounds asserted for summary disposition are based on MCR 2.116(C)(10), as is the case here, "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Thus, on remand, BOA could attempt to amend its answer so that it does call out the affirmative defense of abandonment. In light of this likely scenario after our disposition of the case and the fact that the parties have briefed the issue of abandonment before us, we will address the merits of the defense for judicial economy.

A contract may be "'effectually rescinded by the actions of the parties where they mutually abandon all further performance under it, and treat it as at an end, neither seeking to

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any further rights or obligations hereunder." But there was no evidence that this or any other termination clause was invoked by any party.

hold the other to any accountability under it.'" *Young v Rice*, 234 Mich 697, 700; 209 NW 43 (1926), quoting Black on Rescission, § 1251 *et seq.* "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted." *Dault v Schulte*, 31 Mich App 698, 701; 187 NW2d 914 (1971), quoting 17A Am Jur 2d, Contracts, § 543.[5] "An abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances. A contract will be treated as abandoned when acts of one party, inconsistent with the existence of the contract, are acquiesced in by the other party." *Dault*, 31 Mich App at 701.

BOA claims that plaintiffs abandoned the agreement as evidenced by two written communications by Clapper's counsel. An e-mail message sent on February 18, 2011, at 11:25 a.m., from James C. Adams, counsel for Clapper, to Michael Ryan, counsel for BOA, stated:

> I wanted to take a moment to thank you and Bruce Lenz for meeting with [Timothy Van Dusen, counsel for plaintiff Oak Leaf] this morning at what was to have been the closing. We appreciate your courtesy. Obviously we all would have liked to have had [Zochowski] present, but that was not to be.
>
> I also want to reiterate that David Clapper is willing to do a new deal with [BOA] without [Zochowski] if terms can be reached to do so.

On February 22, 2011, Adams sent the following letter to Ryan:

> Thanks again for your courtesies on Friday. This letter is for the purpose of reiterating the course of events of that day. The bank scheduled, and all parties had agreed to, the closing . . . for 10:00 [a.m.] on Friday (February 18, 2011). Tim Van Dusen, as counsel to Oak Leaf Financial Corp, and I, as counsel to David Clapper, arrived at the bank at the appointed time. Tim had with him all the previously agreed-upon closing documents, including all those that were to have been executed by [Zochowski] and his entities, and executed originals of those documents David Clapper was to sign. David Clapper was prepared to close. [BOA] had previously indicated that [Clapper's] presence was not required as long as his signed documents were there, but that [Zochowski] would be required to be present as a condition of closing. Both [Zochowski] and his counsel, Tim Dugan, were fully informed and aware of the time and place for closing; however, Tim Dugan advised Tim Van Dusen at approximately 9:00 [a.m.] on Friday that neither he nor [Zochowski] would come to the bank for the closing, and that "there will be no closing today."
>
> You and Bruce Lenz indicated that [BOA] would be willing to entertain a transaction whereby David Clapper would purchase the loan obligations without [Zochowski] or his entities being involved, but only in the form of an entirely new

[5] Formerly 17 Am Jur 2d, Contracts, § 484, pp 954-955.

> transaction and not under the existing Restated Purchase and Assignment Agreement. It is our understanding that the bank intends to immediately exercise its remedies against [Zochowski] and his entities under all his defaulted loans, deficiencies and guarantees.

The correspondence from Clapper's counsel to BOA's counsel did not evidence anyone's intent to abandon the restated agreement. *Dault*, 31 Mich App at 701. At most, it depicted amenability to enter into an "entirely new transaction," not an abandonment of anyone's rights to sue under the restated agreement. Further, given that Clapper and Oak Leaf each retained their own counsel,[6] there is no basis to conclude that any statement of one plaintiff's attorney would have bound the other plaintiff. While Clapper signed the agreement on behalf of Oak Leaf, Clapper, himself, was not a party to the agreement. Accordingly, even if the trial court were to entertain BOA's defense of abandonment, BOA failed to present any evidence that anyone had abandoned the restated agreement.

We note that at the motion hearing, the trial court concluded, without elaborating, "When closing did not occur on the restated agreement[,] it was, in effect, abandoned." This was neither an accurate adoption of BOA's abandonment argument[7] nor a correct statement of the law.

IV. CONCLUSION

We reverse the trial court's April 19, 2012, order denying plaintiffs' motion for summary disposition and granting summary disposition in favor of BOA. On remand, the trial court is to enter summary disposition in favor of Oak Leaf[8] on the limited issue of liability raised in plaintiffs' motion for summary disposition related to BOA's breach of ¶ 3(d) of the agreement; the issue of damages remains open. We do not retain jurisdiction. Plaintiffs, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio

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[6] Adams's February 22, 2011, letter to Ryan specifically identified "Tim Van Dusen, as counsel to Oak Leaf Financial Corp, and [Adams], as counsel to David Clapper."

[7] BOA argues that plaintiffs' conduct following the failed closing, and not the failure of the closing itself, represented plaintiffs' abandonment of the restated agreement.

[8] With Oak Leaf being the only other party to the restated agreement aside from BOA, it is clear that only Oak Leaf can recover on plaintiffs' breach of contract claim.